

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-7468

To be argued by  
ROY L. REGOZIN

**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

WAINWRIGHT SECURITIES INC.,

*Plaintiff-Appellee,*

—against—

WALL STREET TRANSCRIPT CORPORATION  
and RICHARD A. HOLMAN,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFF-APPELLEE**  
**WAINWRIGHT SECURITIES INC.**

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# United States Court of Appeals

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and RICHARD A. HOLMAN,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## BRIEF FOR PLAINTIFF-APPELLEE WAINWRIGHT SECURITIES INC.

This is an appeal by defendants-appellants Wall Street Transcript Corporation and Richard A. Holman, who publish *The Wall Street Transcript* ("*The Transcript*"), from a preliminary injunction issued by the Honorable Morris E. Lasker, entered in the United States District Court for the Southern District of New York on October 12, 1976 (253a-255a),\* which prohibits them, during the pendency of this action, from:

"(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May

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\* References in the form (—a) are to the Joint Appendix herein.

17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript*, respectively; and

(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature 'Wall Street Roundup' of *The Wall Street Transcript*. . . ." (254a)

Judge Lasker found that plaintiff-appellee, Wainwright Securities Inc. ("Wainwright")\* had established a prima facie case that defendants-appellants (hereinafter the "Transcript") had infringed Wainwright's copyrights in its Research Reports and that there is a substantial risk that, unless restrained, the Transcript would continue to do so during the pendency of this action. Judge Lasker also found that Wainwright had demonstrated irreparable injury. Judge Lasker's findings of fact and conclusions of law are set forth in his Memorandum Opinion dated August 19, 1976 (211a-224a), which has been reported at 418 F.Supp. 620.

Wainwright commenced this action after repeated publications by the Transcript of unauthorized abstracts of Wainwright's copyrighted Research Reports and after its requests that the Transcript cease to do so went unheeded. The abstracts consist entirely of verbatim extracts from and paraphrases of the Wainwright Reports, which are

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\* This action was commenced by H. C. Wainwright & Co., a Massachusetts limited partnership. After the Transcript's Amended Notice of Appeal was filed, the institutional research business until then conducted by H. C. Wainwright & Co. and the copyrights in the Research Reports, were transferred to Wainwright Securities Inc., a Delaware corporation. The descriptions of the business and of the Research Reports prepared and distributed by H. C. Wainwright & Co. submitted to the District Court accurately portray the business now conducted by, and the Research Reports now prepared and distributed by, Wainwright Securities Inc.

the sole source for the abstracts. Judge Lasker found that the abstracts "suck the marrow from the bone of Wainwright's work without even the assertion of any independent research. . . ." (220a)

The Transcript's reliance in this appeal on the First Amendment and the doctrine of fair use are misplaced. Judge Lasker correctly held that the doctrine of fair use encompasses the First Amendment, which therefore does not provide a separate defense to an action for copyright infringement, and that the Transcript's abstracts do not constitute a fair use of Wainwright's Reports. Judge Lasker's preliminary injunction was narrowly drawn and properly issued to prevent the Transcript from continuing to publish such abstracts.

### **Counter-Statement of the Questions Presented**

1. Does the unauthorized publication of abstracts of copyrighted research reports, which abstracts are based entirely upon and consist entirely of verbatim extracts from and paraphrases of such reports and which present the projections, analyses and conclusions of such reports, constitute a "fair use" of the copyrighted reports?

2. Did the District Court abuse its discretion by issuing the preliminary injunction entered in this action on October 12, 1976?

### **Counter-Statement of the Case**

The facts are set forth in Judge Lasker's Memorandum Opinion (211a-226a) and will only be briefly described here.

Wainwright is a brokerage firm engaged in the securities industry, specializing in institutional research. Ap-

proximately 90% of its revenues and an even greater percentage of its profits are derived from its institutional research operation which involves approximately 80 professionally trained persons. Wainwright supplies its more than 900 institutional clients with in-depth, analytical Research Reports relating to approximately 275 industrial, financial, utility and railroad corporations and the approximately 30 industries in which they are engaged.\* These corporations account for the bulk of the market value of a typical institutional equity portfolio as measured by capitalization. (211a) The Research Reports present the conclusions, analyses and projections of Wainwright's securities analysts, and are "an especially valued feature which distinguishes Wainwright's services from other brokers'." (223a) Wainwright's Research Reports are duly copyrighted in accordance with the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975). (211a-212a)

*The Transcript* is a weekly publication. One of its features is the "Wall Street Roundup" which "consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers." (212a) *The Transcript* "advertises itself to the financial world as a purveyor of institutional research reports in abstract form." (*Id.*) A typical advertisement, which appeared in the July 5, 1976 issue of *Barron's*, proclaims:

"[N]ow you can read 1,000 pages of institutional research in 30 minutes! First thing each week, THE WALL STREET TRANSCRIPT brings you a *fast-reading, pinpointed account of heavyweighted reports from the top institutional research firms.*

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\* Wainwright also sells its Reports for cash to clients who do not generate sufficient commission business, and to non-clients. (194a)

*"Our WALL STREET ROUNDUP will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each year; and index every bit of it for you, immediately and continuously, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." (162a; emphasis added)*

Wainwright protested the publication by the Transcript of abstracts of its copyrighted Research Reports promptly upon learning of such publications. (213a)\* When the Transcript persisted in publishing further abstracts, Wainwright commenced this action by Order to Show Cause seeking a temporary restraining order and preliminary injunction for copyright infringement and unfair competition.

On July 9, 1976, Judge Lasker issued a temporary restraining order and scheduled the hearing on Wainwright's motion for preliminary injunction for July 22, 1976. (127a-129a) Counsel for the Transcript, in response to an inquiry by the Court at the July 9 hearing, stated that they would not present or call any witnesses at the hearing on Wainwright's motion for a preliminary injunction. (238a)

At the hearing on July 22, no witnesses were called. Judge Lasker stated that he was inclined to grant an injunction, and requested the parties to submit proposed forms of preliminary injunctions. (238a-239a)

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\* Wainwright's description of the ensuing discussions and correspondence between counsel for the respective parties prior to institution of this lawsuit is set forth in the affidavit of Roy L. Regozin, sworn to July 9, 1976 (141a-145a) to which were attached copies of such correspondence (165a-179a). Judge Lasker found that counsel "attempted responsibly but unsuccessfully to reach agreement as to their respective rights." (213a)

The Transcript did not submit a proposed injunction, nor did they comment upon the proposed injunction submitted by Wainwright. Instead, they submitted a letter enclosing "what we consider clearly permissible matters for a newspaper to publish in connection with Wainwright's copyrighted material", and further stating that "we do not believe that these permissible matters are the outer limits of fair use or fair comment but are clearly within such outer limits." (200a) The first item in the "List of Permissible Matters" attached to the letter would permit publication of a "summary" of a Wainwright Report, and defined "summary" as "containing or comprising the chief points or the sum and substance of a matter" (201a).

On August 19, 1976, Judge Lasker granted Wainwright's motion for a preliminary injunction and issued his Memorandum Opinion. (211a-224a) Rejecting the Transcript's assertions to the contrary, he found Wainwright's Reports to be both copyrightable and properly copyrighted. (214a-215a) He found that

"The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very *raison d'être* to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutely substantial in quantity." (220a; emphasis in the original)

He held that the abstracts do not constitute a fair use of Wainwright's Reports (218a-223a) and that they constitute derivative works under 17 U.S.C. §.7 (1970), published without the consent of Wainwright (224a).

Judge Lasker rejected the Transcript's assertion that the abstracts were protected by the First Amendment, holding that the First Amendment has no application to copyright law apart from considerations of public access to information as assured by the doctrine of fair use. (216a-217a) He rejected as totally unsupported the Transcript's assertion that Wainwright's Reports utilized "inside information" in violation of the federal securities laws. (217a-218a)

Judge Lasker concluded that "Wainwright has without question made a prima facie showing of infringement" (224a) and that a preliminary injunction was necessary to

"shield [Wainwright] from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public." (224a)

The preliminary injunction signed on August 19, 1976 was that proposed by Wainwright, with the exception that Judge Lasker struck therefrom language which would have enjoined the Transcript from publishing "any other infringements of plaintiff's copyrights in its Research Reports". (225a-226a)

The Transcript subsequently moved for reargument which motion was denied at a hearing held on October 1, 1976 (242a-252a). The provisions of the August 19 preliminary injunction dealing with impoundment and with the size of the bond were modified with Wainwright's consent. The superseding preliminary injunction, from

which this appeal was taken, was entered on October 12, 1976 (253a-255a).

Although Judge Iker agreed to stay the injunction for five days to permit the Transcript to apply to this Court for a stay (251a-252a), no such application was ever made to this Court, nor did the Transcript make any application to this Court for a preference under § 27(e) of the Second Circuit Rules.

## ARGUMENT

### I

**The Transcript's abstracts clearly infringe Wainwright's copyrights in its reports and are not protected by either the doctrine of fair use or the First Amendment.**

The case law clearly supports the Court's finding that Wainwright made a prima facie showing of infringement. It is also clear that fair use is not a viable defense under the facts of this case, and that the First Amendment does not provide a defense to a claim of copyright infringement separate from the defense of fair use.

#### **A. *Wainwright Made a Prima Facie Showing of Infringement***

Pursuant to Article I, Section 8 of the United States Constitution, Section 1 of the Copyright Act, 17 U.S.C. § 1 (1970 & Supp. V 1975) grants to the copyright holder "the exclusive right . . . [t]o print, reprint, publish, copy, and vend the copyrighted work . . ." (Section 1(a)) and, if the work is a literary work "[t]o . . . make any other version thereof" (Section 1(b); emphasis added). Section 7 of the Copyright Act, pertaining to derivative works, provides that:

"Compilations or *abridgments*, adaptations, arrangements, dramatizations, translations, or *other versions*

of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title . . . .” 17 U.S.C. § 7 (1970) (emphasis added)\*

It is clear that the copyright laws expressly reserve exclusively to the copyright owner the right to create or authorize a derivative version of the underlying work. See 1 *Nimmer on Copyright* § 44 at 175.2 (1976); *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F.Supp. 518 (E.D.N.Y. 1965); *Ilyin v. Avon Publications, Inc.*, 144 F.Supp. 368 (S.D.N.Y. 1956).

It is equally clear that the abstracts published by the Transcript are based solely upon Wainwright's copyrighted Reports and consist in their entirety of verbatim extracts from and paraphrases of such Reports. Before Wainwright commenced this action, counsel for the Transcript consistently referred to the publications concerning Wainwright's Reports as “digests” (167a, 168a, and 171a). It was only thereafter that the abstracts were referred to as “news accounts”. The Transcript's advertising describes

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\* Section 106 of the new Copyright Act recently enacted by Congress (Pub.L.No. 94-553, 90 Stat. 2541 (Oct. 19, 1976)), to take effect January 1, 1978, grants to the copyright owner the exclusive right “to prepare derivative works based upon the copyrighted work”. Section 101 of the Act defines the term derivative work:

“A ‘derivative work’ is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, *abridgment*, *condensation*, or *any other form in which a work may be recast, transformed, or adopted*. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.” (emphasis added)

the abstracts as direct and convenient substitutes for the reading of the actual Wainwright Reports (162a-164a). Judge Parker found that the abstracts concentrate on the analyses, projections and conclusions set forth in the Wainwright Reports (220a).

The courts have uniformly held abbreviated versions of copyrighted works, produced without the consent of the copyright owner, to be infringements. Thus, in *Houghton Mifflin Co. v. Noram Publishing Co.*, 28 F.Supp. 676 (S.D. N.Y. 1939), a temporary injunction was granted enjoining publication of a highly condensed version, in tabloid form, of a lengthy copyrighted book. There, as here, the infringers represented to the public that their version conveyed the essence of the original while relieving the reader of the "trying, tiresome task" of reading the original, and claimed to have "expressed in a single sentence a thought which [the author] required two or three pages to present." 28 F.Supp. at 678.

In *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797 (7th Cir. 1921), a newspaper excerpted, by direct quotation or through paraphrase, and with attribution,\* approximately 10 per cent of a copyrighted article published by another newspaper. The court in affirming the district court's ruling that the original article had been infringed, found that the infringing work

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\* Acknowledgment of an appropriation or the use of quotation marks does not excuse an infringement or relieve the appropriator from liability. *Id.* at 799; *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F.Supp. 302, 304 (E.D.Pa. 1938); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 666 (7th Cir. 1950). Indeed as the court in the *Chicago Record-Herald* case observed:

"Far from there being any exculpatory virtue in [attribution], it would tend rather to convey to the reading public the false impression that authority to appropriate the extracts from the copyrighted article had been duly secured by the offending publisher." 275 F. at 799.

"presents the essential facts of that article in the very garb wherein the author clothed them, together with some of his deductions and comments thereon in his precise words, and all with the same evident purpose of attractively and effectively serving them to the reading public." (275 F. at 799)

That the abstracts consist in their entirety of verbatim extracts from and paraphrases of Wainwright's Reports is demonstrated in Judge Lasker's opinion, which compares portions of two of the abstracts side-by-side with the portions of the Wainwright Reports from which they were derived (220a-222a) and which the Court stated "illustrate particularly well the remarkable extent of copying" (220a).\*

The assertion in the Brief of the Wall Street Transcript Corporation that the Court apparently enjoined "the distribution of the news account relating to CIT Financial Corporation . . . without consideration of the question of whether or not there was any copyright infringement or any copying" (WSTC Br. p. 9) is unfounded. The abstract of Wainwright's Report on C.I.T. was conceded by the Transcript to be a "digest" which paraphrased the Report, and was written with the purpose of evading a finding of verbatim copying (171a-172a). Neither Judge Lasker's opinion nor the case law requires verbatim copying as a necessary condition for a finding of infringement. It is well-established that "paraphrasing is tantamount to copying in copyright law". *Davis v. E. I. DuPont de Nemours & Co.*, 240 F.Supp. 612, 621 (S.D.N.Y. 1965); see *Nutt v. National Institute Incorporated for the Im-*

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\* Side-by-side comparisons of the portions of the remaining abstracts and the portions of the Wainwright Reports from which they were derived are set out at pages 151a-160a.

*provement of Memory*, 31 F.2d 236 (2d Cir. 1929); *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*, 79 F. 756 (2d Cir. 1897); *Donald v. Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

Judge Lasker clearly indicated that he was unprepared for the Transcript's argument concerning the C.I.T. abstract, which was not discussed in their motion for re-argument. Immediately after the colloquy quoted on pages 9 to 10 of the Brief of the Wall Street Transcript Corporation, Judge Lasker stated:

"THE COURT: I am not prepared to sit here without having an opportunity to think about it or to see why you claim that this is different from the others. I don't know what to say at the present time. If you wish to move further to modify the injunction to eliminate L on grounds that you set forth, not at any great length, and Mr. Regozin make his comments in answer, I will be glad to give it a good faith consideration. . . ." (250a)

The Transcript did not move to further modify the preliminary injunction.

Whether the copyrighted work was copied verbatim or paraphrased, it is clear that the Transcript appropriated to themselves the benefit of Wainwright's creative efforts and research without any independent effort of their own. The copyright laws are intended to prevent such appropriations. Thus, in *Orgel v. Clark Boardman Co.*, 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962), involving the substantial similarity of portions of a law treatise to a chapter of the plaintiff's treatise, this Court held:

"Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expendi-

ture of the time and effort required for the independently arrived at results is copyright infringement." 301 F.2d at 120

In *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F.Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974), Judge Owen held that both the extensive paraphrasing by defendant of plaintiff's textbook and also the usurpation of the outline and structure of the work amounted to infringement. The Court stated:

"[I]t is hardly an inducement to someone like a Dr. Mussen [the plaintiff] to do the years of research and scholarship needed to produce an authoritative text if an untrained freelance speech writer for an oil company may paraphrase major portions and make a competing text out of it." 378 F.Supp. at 690

In *Huie v. National Broadcasting Co.*, 184 F.Supp. 198 (S.D.N.Y. 1960), the Court stated:

"[I]f an historian had published a history of the negotiations between the Soviet Union and the United States with respect to nuclear explosions and copyrighted it, it would be an infringement of the copyright for another historian to publish a history rewritten from the first historian's book without any independent research." 184 F.Supp. at 200

In *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*, *supra*, the Court enjoined publication of defendant's syllabi of judicial opinions, which it held infringed the copyrighted syllabi of the plaintiff notwithstanding the fact that the challenged syllabi did not reproduce the language of the original:

"[I]t is not the law that a copyrighted syllabus can be infringed only by a reproduction of its original lan-

guage. It is the unfair appropriation of the labor of the original compiler that constitutes the offense. *Identity of language will often prove that the offense was committed, but it is not the sole proof; and, when the offense is proved, relief will be afforded, irrespective of any similarity of language.* For example, if, in a case like this, defendant's editors should one and all testify that they made up their digest from complainant's syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that *such digest would be held to infringe, although the work were so cleverly done that no identity of language could be found in a single paragraph.*" 79 F. at 762 (emphasis added)

While the Transcript could themselves go directly to original sources, as Wainwright did, and by research and effort make their own compilation and analyses of the facts obtained, they admittedly have not done so. Instead, they have simply reprinted information compiled by Wainwright and Wainwright's analyses of such information. This clearly constitutes infringement. *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*, *supra*, 79 F. 756; *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942); *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 487 (9th Cir. 1937); *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc.*, 371 F.Supp. 900, 906 (W.D. Ark. 1974). See also *Lawrence v. Dana*, 15 F.Cas. 26 (No. 8136) (C.C.D. Mass. 1869).

**B. *The Transcript's Abstracts Are Not a Fair Use of Wainwright's Copyrighted Reports***

A review of the cases involving fair use establishes that the courts have only found fair use when the subse-

qu work involved independent effort. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d C'r. 1966), *cert. denied*, 385 U.S. 1009 (1967), which Judge Lasker stated is the leading case on fair use in this Circuit (218a) and on which the Transcript principally relies for their appeal, the defendants had written a 304-page biography based on extensive independent research.

Having done no research in connection with the preparation of the abstracts, the Transcript contended below that "independent work, if such be required, is the reading of the . . . Wainwright copyrighted report" (214a), to which Judge Lasker replied:

"Such a theory, if validated, would make a shambles of the copyright law; copyright would dissolve upon the mere reading of the protected material, and protection would be a chimera. Neither the Constitution nor the statute contemplates such evanescent or worthless protection." (215a)

Although Judge Lasker found that the Transcript did no independent work (214a) and that the "true nature of the Transcript's abstracts is that of a derivative work" (224a), he nevertheless gave the Transcript the benefit of the doubt and evaluated their fair use claim using the criteria set forth in his own oft-cited opinion in *Marvin Worth Productions v. Superior Films Corp.*, 319 F.Supp. 1269 (S.D.N.Y. 1970):

"The cases and commentaries attempting to define the quicksilver content of 'fair use,' although varying and overlapping in their definitions, appear to agree that at least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantive taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce

the demand for the original copyrighted property? (3) . . . [D]oes the distribution of the material serve the public interest in the free dissemination of information? And (4) does the preparation of the material require the use of prior materials dealing with the same subject matter?" 319 F.Supp. at 1274\*

Carefully considering each test in turn, Judge Lasker properly concluded that the abstracts were infringements.

First, Judge Lasker found that

"The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very *raison d'être* to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wain-

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\* The Court also noted the "[s]imilar factors, declared to be a codification of existing law" (219a at n.4) in Section 107 of the then-pending Senate version of Public Law 94-553, the new Copyright Law to go into effect on January 1, 1978. Section 107 as enacted lists the following factors:

"(1) the purpose and character of the use, *including whether such use is of a commercial nature or is for nonprofit educational purposes*;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work." (emphasis added)

The factors as enacted are identical to those in the proposed bill quoted by Judge Lasker with the exception of the portion italicized above which was added in Conference Committee. See H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976).

As the Committee Reports state and as the Transcript concedes (WSTC Br. p. 27), the new provision was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S.Rep. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976). In any event, it is clear that Judge Lasker considered the result to be the same under either of these similar sets of criteria.

wright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports, they are nevertheless absolutely substantial in quantity." (220a; emphasis in original)

The Transcript's own descriptions of their abstracts preclude them from claiming that the takings are anything less than substantive qualitatively. The Transcript does attempt to minimize the takings quantitatively by claiming that "[t]o the extent that the Transcript used the words or phrases contained in a research report, such use was de minimis, when compared with the volume of the research report" (WSTC Br. p. 29), and that the five Wainwright Reports contained "over 36,000 words and figures" while the abstracts derived from them contained "less than 1,400 words and figures" (Holman Br. p. 6)

The answer to this contention is that the substantiality of a taking "cannot be determined alone by the lines or inches which measure the respective [works]". *Chicago Record-Herald Co. v. Tribune Ass'n*, *supra*, 275 F. at 799. To constitute an infringement it is "sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole." *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, *supra*, 23 F.Supp. at 303 (enjoining as an infringement the quotation in a brochure of three sentences from a copyrighted book). *See also College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874 (2d Cir. 1941) (copying of word list consisting of less than 15 percent of the contents of either book held an infringement); *Hedeman Products Corp. v. Tap-Rite Products Corp.*, 228 F.Supp. 630 (D.N.J. 1964) (infringement

of less than 1 percent of total page area of copyrighted book); *Higgins v. Baker*, 309 F.Supp. 635 (S.D.N.Y. 1969) (taking of .8 percent held an infringement).

With respect to the second test set forth in *Marvin Worth*, Judge Lasker found that "[t]here is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services" (223a), that the abstracts make the contents of the Reports available to brokers with whom Wainwright competes (223a), thereby enabling them to provide advice to their clients which might otherwise have had to be obtained from Wainwright, and that the abstracts "impair Wainwright's ability to publish its own abstracts or to authorize others to do so." (223a)

Judge Lasker found that the provision of Wainwright's Reports to its clients is "an especially valued feature which distinguishes Wainwright's services from other brokers'." (*Id.*) The Transcript's advertising establishes that their abstracts are intended as a substitute for the Reports. The Wall Street Roundup will "save . . . hundreds of hours of reading" (162a) only if readers of *The Transcript* read it in place of the research reports abstracted therein.

A use which *in any way* competes with the copyrighted work is unfair. See 2 *Nimmer on Copyright* § 145 at 649 (1976). Where, as here, the use serves as a substitute for the copyrighted work, the unfairness of the use is clear.\* See *Marvin Worth Productions v. Superior Films Corp.*,

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\* That the Transcript may have received requests from readers for complete copies of Wainwright Reports is of no avail—there is no way of knowing how many requests for Reports or for brokerage services based upon analyses, projections and conclusions set forth in such Reports Wainwright never received because readers of *The Transcript* considered the abstracts sufficient.

*supra*, 319 F.Supp. 1269; *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F.Supp. 376 (D. Conn. 1972), *aff'd*, No. 72-1826 (2d Cir. May 30, 1973); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914).

Moreover, regardless of whether there is any direct competition, if the use adversely affects the value or tends to diminish or prejudice the potential marketability of the copyrighted work it will be held to be an infringement. Thus, in *Addison-Wesley Publishing Co. v. Brown*, 223 F.Supp. 219 (E.D.N.Y. 1963), the Court permanently enjoined the publication of a book of solutions to problems set forth in a copyrighted college physics textbook, although the actual problems were not reproduced. Holding that the value of the copyrighted book was imperiled, the Court found the solution book to be an infringement. *See also*, 2 *Nimmer on Copyright* § 145 at 646 (1976); *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944).

With respect to the third test set forth in *Marvin Worth*, Judge Lasker found that "distribution of the abstracts [is not] necessary to serve the public interest in the free dissemination of information." (223a) The public can obtain the Reports from Wainwright, and the Transcript can prepare and issue their own research reports if they so desire.

With respect to the fourth test, Judge Lasker found that, although prior materials might have to be used by the Transcript, "such a need frees the Transcript to get such prior materials from the source only—that is, to do its own research—not to lift passages wholesale from Wainwright's independent product under the guise of merely repeating facts or business terms or furnishing news to the public." (223a)

The new Copyright Law includes among the factors to be considered in determining whether a use is a fair use, "whether such use is of a commercial nature or is for non-profit educational purposes". (p. 16, *supra*) It is clear that the Transcript is a commercial venture. Indeed, the advertisements to which we have already referred solicited subscriptions to *The Transcript*. The Transcript's assertions that they do not publish the abstracts "for pecuniary gain as such" (190a; WSTC Br. p. 12) must raise substantial doubts about their credibility.

The decision in *Rosemont Enterprises, Inc. v. Random House, Inc.*, *supra*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), does not support the Transcript's position. The Court in *Rosemont* stated that a "second . . . publisher cannot bodily appropriate the research of his predecessor." 366 F.2d at 310. This is precisely what the Transcript's abstracts do with respect to Wainwright's Reports.

In *Rosemont*, the defendants, through extensive independent research and effort, created and published a 304-page biography of Howard Hughes. They used two verbatim quotations and an eight-line paraphrase from copyrighted magazine articles about Mr. Hughes published twelve years before. Plaintiff corporation, controlled by Mr. Hughes, acquired the copyrights in those articles and immediately sought to enjoin publication of defendants' biography.

Unlike the case at bar, in *Rosemont*, the Court stated there was considerable doubt whether the copied and paraphrased matter constituted a material and substantial portion of the articles from which they were taken. 366 F.2d at 306. Here, it is clear that the most valuable portions of the copyrighted works are lifted. The Court in *Rosemont* also found that the taken material "at most forms an insubstantial part of the 304-page biography" *id.*, stating

that "[t]he fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard." 366 F.2d at 310. Here, 100 percent of each of the Transcript's abstracts is taken from Wainwright's Reports.

Moreover, in *Rosemont* this Court found that defendants' appropriations could not have injured plaintiff since the copyrighted articles had been out of circulation for twelve years. Here, the abstracts follow the copyrighted Reports by a matter of weeks and are promoted as substitutes for such Reports. See also *Marvin Worth, supra*, 319 F.Supp. at 1275.

The Court in *Rosemont* further observed that the copyright owner of the earlier articles "could not acquire by copyright a monopoly in the narration of historical events", but was entitled to protection of his creative effort. 366 F.2d at 306. Here, Wainwright is not attempting to prevent others from writing about the companies upon which it reports, but seeks reasonable protection of its Reports.

*Rosemont* is consistent with the fair use cases dealing with biographies and histories in recognizing the need for one biographer or historian to build upon valuable source material of another. *Rosemont* cannot be read to shield the kind of parasitism in which the Transcript engages. Cf. *Addison-Wesley Publishing Co. v. Brown, supra*, 223 F.Supp. at 228. A historian cannot "publish a history rewritten from the first historian's book without any independent research." *Huie v. National Broadcasting Co., supra*, 184 F.Supp. at 200. See also *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F.Supp. 686 (S.D. N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974).

*Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968), also relied on by the Transcript, does not

support their position. The defendants in that case had made charcoal sketches of several frames of plaintiff's copyrighted movie (the "Zapruder film") of the assassination of President Kennedy, and published the sketches to illustrate points made in defendants' own book on the assassination. They did not publish a "summary" of the Zapruder film, or a book consisting solely of selected stills from the movie. Defendants' taking was held to be a fair use.

***C. The First Amendment Is Encompassed by the Defense of Fair Use***

The Transcript's assertion that their abstracts are protected by the First Amendment because they are "news accounts" completely misses the mark. It is well-established that newspapers are subject to the Copyright Act, and the courts have found newspapers to have infringed copyrights of others, including other newspapers. Furthermore, the First Amendment does not provide a separate defense to a claim of copyright infringement. If the copyrighted work has been used in the work being challenged, as is admittedly the case here, the only defense is fair use, which encompasses the First Amendment. As already shown, the Transcript's abstracts are not a fair use of Wainwright's copyrighted Reports. (See Point I B, *supra*.)

**1. The Copyright Act Applies to Newspapers**

The Transcript argues that their status as a newspaper immunizes them from the copyright laws. Nothing could be further from the truth. As the Court stated in *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959):

"Freedom of the press bears restrictions. It does not include the right to publish what another has registered with the copyright office." 270 F.2d at 908.

In *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797 (7th Cir. 1921), one newspaper was held to have infringed the copyright of another newspaper in a news article. See *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919); *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F.Supp. 198 (D.Mass. 1942); *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F.Supp. 433 (N.D. Ill.), *aff'd*, 385 F.2d 384 (7th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). As Justice White stated in his concurring opinion, in which Justice Stewart joined, in *New York Times Co. v. United States*, 403 U.S. 713 (1971):

"Article 1, § 8, of the Constitution authorizes Congress to secure the 'exclusive right' of authors to their writings, and *no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another*. See *Westermann Co. v. Dispatch Co.*, 249 U.S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events." (403 U.S. at 731n.1; White J., concurring) (emphasis supplied)

The question thus is not whether the perpetrator is a newspaper, but whether there has been an infringement.

In addition to relying on an immunity which does not exist, the Transcript overstates its case. Judge Lasker found that "[t]he Transcript's ingenious designation of the reports as news is faulty." (216a) He recognized that:

"the fact of Wainwright's issuing a report on a particular company or industry, and perhaps whether it was favorable or unfavorable, bullish or bearish, may be news. . . ." (216a)

However,

"the precise contents of the report are not news—at least if the term is meant to indicate that the material, as is the case of true 'news,' is in the public domain. *The original analytical contents, the style, impressions, estimates, assessments and appraisals of the reports are protected, as is the particular expression of the facts. The public has a right to know the facts, but does not have a right to know them in the particular form in which an author assembles and expresses them.*" (216a, emphasis added)

The Transcript supports their characterization of their abstracts as news accounts with the fallacious assertion that because Wainwright "has chosen to write on publicly traded equities, in the publicly traded market", Wainwright's Reports are themselves raw "news" which may be reprinted at will. (Holman Br. p. 24) Once again, the Transcript overstates their case.

To illustrate the importance of brokerage house reports the Transcript cites an incident in which press reports of the impending release of a study casting doubt on the long-term prospects of a group of stocks was followed by drops in the prices of several of the stocks, some of which dropped further when the report's existence was confirmed in *The Wall Street Journal*. (Holman Br. pp. 17-18) This example is precisely the type of situation Judge Lasker provided for when he stated that "the fact of Wainwright's issuing a report on a particular company or industry, and perhaps whether it was favorable or unfavorable, bullish or bearish, may be news. . . ." (216a) Thus, the Transcript is free to report as news the fact that a Wainwright Report may affect or may have affected the market, but this is not what the Transcript does or asserts the right to do.

In offering to its subscribers the benefit of Wainwright's extensive research and analysis, the Transcript goes far beyond reporting news. We know of no case, and the Transcript cites no case, which has ever sanctioned such a naked appropriation of the property rights of another, whether in the name of reporting the news or anything else.

The Transcript relies on the fact that a Senate Report on an earlier version of the new Copyright Law (S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975)) states that a "summary of an address or article, with brief quotations, in a news report" is an example of a fair use. (WSTC Br. pp. 27 and 29) Leaving aside questions relating to the substantiality of the taking, the Senate Report itself requires a subsequent work involving independent effort, to wit, a news report. The Transcript collapses the distinction between the news report and its contents, and asserts that their abstracts are news accounts.\* As Judge Lasker recognized, this "theory, if validated, would make a shambles of the copyright law". (215a)

The Senate Report relied upon by the Transcript recognized that "the copying of even a short portion of a newsletter may have a significant impact on the commercial market for the work" (S. Rep. No. 473, *supra*, at 66-67) and also recognized that

"[A] use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." (S. Rep. No. 473, *supra*, at 65)

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\* The characterization of the abstracts as news accounts is also suspect because the Transcript did not so characterize them until after this action had been commenced. Until that time, the Transcript themselves referred to them as "digests". (167a, 168a, and 171a)

The Transcript's advertisements alone compel a finding of infringement on this basis.

## 2. Fair Use Encompasses the First Amendment

The Transcript's absolutist approach to the First Amendment ignores established precedent. The First Amendment was never intended by its framers to nullify the copyright clause (U.S. Const. art. I, § 8). In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) the Supreme Court stated:

"The construction placed upon the Constitution by the first [copyright] act of 1790, and the [copyright] act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, is almost conclusive."

Professor Nimmer states:

"The fact that the first amendment was approved by the Congress in 1789 and became effective in 1791 lends added credence to the conclusion that copyright is not prohibited by the first amendment. If it were, Congress would hardly have enacted the first Copyright Act on May 31, 1790, nor the amendment thereto on April 29, 1802." 1 *Nimmer on Copyright* § 9.21 at 28.3-28.4 n. 135 (1976).

The courts have rejected any contention that a copyright infringement is protected by the First Amendment. In *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108 (N.D.Cal. 1972), the Court, in holding that defendants

had infringed plaintiff's copyrighted cartoon characters, stated:

"To extend the First Amendment protection to cover this case would serve to obliterate copyright protection in any instance in which the alleged infringer could claim the intent to convey an idea." 345 F.Supp. at 115

*See Robert Stigwood Group Ltd. v. O'Reilly, supra*, 346 F.Supp. 376, 383 (D. Conn. 1972), *aff'd*, No. 72-1826 (2d Cir. May 30, 1973) ("The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law.") *Cf. United States v. Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974), a record piracy case:

"We fail to see as any protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a single long-playing record of a musical performance."

The courts have held that the First Amendment applies to copyright law through the doctrine of fair use. In *McGraw-Hill Inc. v. Worth Publishers, Inc.*, 335 F.Supp. 415, 422 (S.D.N.Y. 1971) the Court held:

"Defendants' First Amendment argument, in so far as it is distinguishable from their claim of fair use, can be dismissed as flying in the face of established law. *See* U.S. Const. Art. 1, § 8; 17 U.S.C. §§ 1, et seq., 112."

*See also, Walt Disney Productions v. Air Pirates, supra*, 345 F.Supp. at 115.

In the case at bar Judge Lasker held:

"The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use . . . has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." (217a)

That the First Amendment is encompassed by the doctrine of fair use in the copyright area is clear from the criteria employed by Judge Lasker to evaluate the Transcript's claim of fair use. The third criterion is whether "the distribution of the material serve[s] the public interest in the free dissemination of information" (219a). This states the First Amendment question which the Transcript incorrectly emphasizes in this appeal to the exclusion of all other questions. Fair use involves the balancing of public and private interests. The Transcript appears to be oblivious to this, and fails to recognize that copyright protection is granted in order to encourage authors to publish their works and make them generally available, thereby enriching society as a whole.

To state the matter more concisely, fair use of a copyrighted work is protected by the First Amendment and unfair use (infringement) is not. If it were otherwise, there would be no copyright protection.

## II

**Issuance of the preliminary injunction was not an abuse of discretion.**

Injunctions to prevent copyright infringements are specifically authorized by Sections 101\* and 112\*\* of the Copyright Act, 17 U.S.C. §§ 101, 112 (1970 & Supp. V 1975). In particular, Section 112 empowers district courts to grant injunctions to "*prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable.*" (emphasis added)\*\*\*

\* § 101. *Infringement*

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.—To an injunction restraining such infringement . . . ."

\*\* "§ 112. *Injunctions; service and enforcement*

"Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants."

\*\*\* The new Copyright Law, Pub.L.No. 94-553 (Oct. 19, 1976), which takes effect January 1, 1978, continues the protection afforded under the present law. Thus, Section 502 provides, in pertinent part:

"§ 502. *Remedies for infringement: Injunctions.*

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

The preliminary injunction in the case at bar was issued by Judge Lasker on the basis of findings that Wainwright had "without question made a prima facie showing of infringement" (224a), and had demonstrated irreparable injury and that there is a substantial risk that, unless restrained, the Transcript would continue to infringe Wainwright's copyrights in its Research Reports during the pendency of this action. Judge Lasker also considered the harm that the Transcript would suffer if the injunction were granted.

The preliminary injunction prohibits the Transcript from distributing additional copies of the abstracts attached as exhibits to the complaint and from distributing copies of any other abstracts of any of Wainwright's copyrighted Research Reports "presented in the format of the feature 'Wall Street Roundup' of *The Wall Street Transcript*." (254a)

Wainwright submits that Judge Lasker's findings of irreparable injury to Wainwright, likelihood of continued infringement by the Transcript, and lack of irreparable injury to the Transcript if the injunction issued, are amply supported by the record, and that the Transcript's First Amendment and unclean hands defenses were properly rejected.

#### **A. Irreparable Injury**

Judge Lasker found that "[t]here is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services" (223a), that "[t]he Transcript's infringements impair the value of Wainwright's copyrighted material" (*Id.*) and that "unmeasurable consequential damage to its brokerage business . . . could flow from making the contents of its re-

search reports known without cost to competitors, potential clients and the public" (224a).

Although these and other\* findings of irreparable injury are fully supported by the record, it was not necessary for the Court to make such findings for the preliminary injunction to issue. As this Court has held on numerous occasions, the requirements for the issuance of a preliminary injunction in copyright infringement cases are different from those for other kinds of cases. In copyright infringement cases, upon the showing of a prima facie case of copyright infringement, a copyright holder is "entitled to a preliminary injunction *without a detailed showing of danger of irreparable harm.*" *Rushton v. Vitale*, 218 F.2d 434, 436 (2d Cir. 1955) (emphasis added); *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939). The reason is that:

"A copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968)

*See also Rice v. American Program Bureau*, 446 F.2d 685, 688 (2d Cir. 1971).

The injury to Wainwright is incalculable. Wainwright develops and maintains goodwill with its institutional clients by means of the Research Reports which it publishes: the Reports are "the reason Wainwright is able to obtain and keep its institutional clients, which use [them] as fundamental input in their investment decision

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\* For example, the Court found that the abstracts "impair Wainwright's ability to publish its own abstracts or to authorize others to do so." (223a)

making process." (136a) It is not possible to value the loss of goodwill suffered by Wainwright because it is not possible to determine the extent to which Wainwright's institutional clients took their brokerage business elsewhere because of the availability of the abstracts. Nor is it possible to determine how many potential customers of Wainwright used the abstracts as the basis of investment decisions, but did not ask Wainwright to act as their broker to carry out such decisions. (137a) It is not possible to determine the number of Research Reports Wainwright did not sell because of the abstracts, nor is it possible to measure the damage to Wainwright caused by the impairment of its right to publish its own abstracts or authorize others to do so.

Moreover, Wainwright has no control over the manner in which its Reports are abstracted by the Transcript. As the abstracts identify both Wainwright and the securities analyst who prepared the Report, any omissions from or inaccuracies in such abstracts damage both Wainwright and the reputation of its analyst (*Id.*). See *Chicago Record-Herald Co. v. Tribune Ass'n*, *supra*, 275 F. 797, 799; footnote on page 10, *supra*.

The difficulty of measuring the damages which would flow from future infringements is an important consideration in determining whether a preliminary injunction should issue. See, e.g., *Marvin Worth*, *supra*. Existence of a "substantial danger of a loss of good will" will sustain a finding of irreparable harm warranting an injunction. *Walco Products, Inc. v. Kittay & Blitz, Inc.*, 354 F.Supp. 121, 125 (S.D.N.Y. 1972).

Finally, it is clear that the balance of hardships tips decidedly toward Wainwright. Wainwright's copyrighted Reports are the essential element of its highly competitive

business. On the other hand, the Transcript's abstracts of such Reports, enjoined by the preliminary injunction issued by Judge Lasker, "consist of less than one-tenth of one percent of the contents" of *The Transcript*. (233a)

#### **B. Likelihood of Continued Infringement**

The conduct of the Transcript clearly established the likelihood that, unless enjoined, they will continue to publish abstracts of Wainwright's copyrighted Research Reports. The Transcript published abstracts of five Wainwright copyrighted Reports in their Wall Street Roundup feature in a period of less than two months, despite written and oral protests by Wainwright during this period.

In response to Judge Lasker's request that the Transcript submit a proposed preliminary injunction, counsel for the Transcript instead submitted a letter together with a "List of Permissible Matters" containing "what we consider clearly permissible matters for a newspaper to publish in connection with Wainwright's copyrighted material" and stating further that "we do not believe that these permissible matters are the outer limits of fair use or fair comment but are clearly within such outer limits." (200a) Paragraph 1 of the "List of Permissible Matters" states:

"The Transcript's news account may be a summary of the Wainwright copyrighted report, with brief quotations therefrom. The words 'summary' is used herein as defined in the Oxford Universal Dictionary (p. 2076) as containing or comprising the chief points or *the sum and substance* of a matter." (201a; emphasis added)

The Transcript also asserted that if there were a requirement for independent work under the doctrine of fair use.

it could be met by "the reading of . . . the Wainwright copyrighted report." (201a)

The law is clear that a copyright holder is "entitled to an injunction where . . . there is any substantial risk of further infringement", *Walco Products, Inc. v. Kittay & Blitz, Inc.*, *supra*, 354 F.Supp. at 126, and that defendants "have a heavy burden of demonstrating that they have no reasonable expectation of committing the wrong anew", *United Merchants & Manufacturers, Inc. v. Sutton*, 282 F.Supp. 588 (S.D.N.Y. 1967).

An injunction is particularly appropriate where the defendant continues to express a belief in the soundness of his position. The Court in *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F.Supp. 517 (S.D.N.Y. 1971), granted a preliminary injunction where it found that the defendant

"although aware of plaintiff's copyright claims, deliberately . . . used . . . the direct copying of plaintiff's [works], and vigorously persists in pressing its right so to employ the [works]." 329 F.Supp. at 529.

*See also Local Trademarks Inc. v. Grantham*, 166 F.Supp. 494, 508 (D.Neb. 1957) (permanent injunction).

The Transcript urges that the injunction against future infringements of copyrighted Wainwright Reports in the format of the previous infringements must be reversed because "[n]o one can say that any news account written in the future of a research report not yet written, will be written in such a manner as to violate the copyright laws". (WSTC Br. p. 33) This position is untenable. The preliminary injunction enjoins the Transcript from publishing any other *abstracts* of Wainwright's *copyrighted* Re-

ports in the *format* of the feature Wall Street Roundup which Judge Lasker found "consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers." (212a) In short, the Court enjoined the Transcript from doing precisely what they had done and asserted the right to continue to do—print abstracts comprising the "sum and substance" of copyrighted Wainwright Reports without any independent research on their part, and merely using verbatim extracts from or paraphrases of the Wainwright Reports.

The Court only enjoined the publication of abstracts in the same format as the past infringements; it enjoined nothing else. In light of the Transcript's advertising, their course of conduct and their statements to the Court, any narrower injunction simply would not protect Wainwright:

"If the right can only be protected by perpetual and endless litigation, it is not much of a right. The holder of such right cannot be truly said to enjoy the exercise of the right; in effect, he has become little more than a policeman *cum* litigator." 2 J. Taubman, *Performing Arts Management and Law* § 26.1 at 1104-05 (1972) (emphasis added)

A narrower injunction would not prevent the Transcript from publishing additional abstracts in the same format, and would therefore result in Wainwright's having to institute a new action each time a new abstract was published by the Transcript.

In *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108 (N.D.Cal. 1972) the Court preliminarily enjoined the defendants from printing and marketing the publication in question and any other infringing publications, relief far broader than that granted by Judge Lasker in the case at bar:

"... from infringing any copyrights of plaintiff in any manner, from printing, making, manufacturing, publishing, selling, marketing, displaying for sale or otherwise turning to account any copies or counterparts of the [infringing] publications entitled 'Mickey Mouse Meets the Air Pirates' and 'Air Pirates' Funnies and attached to the complaint as Exhibits A and B, any further issues of said publications, or any other publications or objects which infringe any of plaintiff's copyrights." 345 F.Supp. at 116 (emphasis added)

*Cf. Leeds Music Ltd. v. Robin*, 358 F.Supp. 650 (S.D. Ohio 1973) (defendants enjoined at the stage of *planning* the production of a work which the Court held would, if produced, constitute an infringement of plaintiff's work). Cases in which injunctive relief for copyright infringement was granted against newspapers are cited *infra*, under Point II C.

### C. *The First Amendment Defense*

The Transcript's assertion that its status as a newspaper makes impermissible any injunctions against it under the Copyright Act, whether with respect to past or future infringements, is as wide of the mark as its assertion that its abstracts are protected by the First Amendment from a finding of infringement because they are "news accounts". (See Point I C above.)

The law is clear that "freedom of the press" does not include the right to publish what another has copyrighted. *Worthy v. Herter*, *supra*, 270 F.2d 905, 908 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959). More than 50 years ago, the Supreme Court approved an injunction against a newspaper preventing future infringements of plaintiff's copyrights. *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919).

In *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F.Supp. 433 (N.D. Ill.), *aff'd*, 385 F.2d 384 (7th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968), the Court awarded an injunction to "assure [plaintiff] of the protection of its rights in the future" even though the Court concluded that plaintiff's damages for past infringements of its copyrights were "not really substantial". 259 F.Supp. at 439.

The Transcript places considerable emphasis on *New York Times Co. v. United States*, 403 U.S. 713 (1971). Justice Brennan's concurring opinion, which the Transcript asserts supports their position, contains the statement that "copyright cases have no pertinence here" (403 U.S. at 726n.) clearly indicating that the result would be different if the Copyright Act applied. That the result would indeed have been different is apparent from Justice White's concurring opinion (in which Justice Stewart joined) and which is dispositive of the Transcript's claim:

"no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another." (403 U.S. at 731 n.1)

The First Amendment cases which the Transcript cites in support of its contention that the preliminary injunction issued by Judge Lasker is improper are inapposite because they do not involve copyright infringement.\* It is

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\* The First Amendment cases cited by the Transcript involve constitutional challenges to state and federal statutes and to other governmental action, libel actions, and the right to picket and leaflet.

The cases cited by the Transcript which involve facially invalid statutes are *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —; 96 S.Ct. 1817 (1976); *Buckley v. Valeo*, — U.S. —; 96 S.Ct. 612 (1976); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota*, 283 U.S. 697 (1931). The following cases involve invalidation of statutes as

well-established that in the copyright area the First Amendment is encompassed by the doctrine of fair use (see discussion under Point I C, *supra*). As the Transcript's abstracts of Wainwright's copyrighted Reports are not a fair use of the Reports, they are not protected by the First Amendment.

In short, once a *prima facie* case of copyright infringement has been established, a preliminary injunction may

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applied: *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (state statute and state common-law privacy action); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (challenge to federal statute as construed and applied). The cases involving other governmental action are: *Nebraska Press Association v. Stuart*, 427 U.S. —; 96 S.Ct. 2791 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969). The libel cases cited by the Transcript are: *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971), involved an injunction against picketing and pamphleteering. *AFL v. Swing*, 312 U.S. 321 (1941), held that state common law policy forbidding union picketing where there is no immediate employer-employee dispute, violates the right of free speech.

Furthermore, most of the copyright cases cited by the Transcript in support of their First Amendment argument do not even discuss the First Amendment. In *Whcaton v. Peters*, 33 U.S. (8 Pet.) 590 (1834) the Supreme Court established that publication destroys common law copyright protection. In *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court affirmed the Circuit Court's decision that the respondents' statuettes were copyrightable and therefore that the respondents were entitled to appropriate relief against infringement. The respondents had requested an injunction and damages. *Stein v. Mazer*, 204 F.2d 472, 473 (4th Cir. 1953), *aff'd*, 347 U.S. 201 (1954). In *Krafft v. Cohen*, 117 F.2d 579 (3d Cir. 1941), the Court held that the plaintiff was not entitled to an injunction or damages because it had not complied with the statutory provisions on notice. Wainwright, on the other hand, has fully complied with the statutory requirements for copyright.

be issued if the criteria for injunctive relief are met. *Rush-ton v. Vitale*, 218 F.2d 434 (2d Cir. 1955).

#### **D. Unclean Hands Defense**

The Transcript's assertion that Wainwright should be denied any relief because it used inside information in its Research Reports (Holman Br. p. 30) is both unsubstantiated and incorrect as a matter of law.\*

The only support for the claim in the record is the assertion by Mr. Holman that he read the Wainwright Reports and, on information and belief derived from that reading, reached the conclusion that Wainwright circulated inside information in the guise of Research Reports. (182a) Judge Lasker read the Reports and concluded that "[n]othing contained in them appears to support the Transcript's claim" (218a). Moreover, Wainwright's Director of Research categorically denied the use of inside information. (196a; 218a)\*\*

The Transcript's claim that there should have been an evidentiary hearing concerning the alleged use of inside information (WSTC Br. p. 32) is totally without merit. The Transcript, in response to an inquiry from the Court at the

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\* Before Judge Lasker issued his Memorandum Opinion, Wainwright filed a motion to strike the Transcript's affirmative defense of unclean hands (209a). The motion is *sub judice* before Judge Lasker, who indicated he would not rule on it until after this appeal had been decided.

\*\* The merely conclusory allegations of use of inside information set forth in the Transcript's Third Defense (209a) do not satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which provides in pertinent part that "[i]n all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity." See *Shemtob v. Shearson, Hammill & Co., Inc.*, 448 F.2d 442 (2d Cir. 1971). An averment of securities fraud based solely upon information and belief, "must be accompanied by a statement of the facts upon which the belief is founded." *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972).

hearing held on July 9, 1976, on Wainwright's order to show cause, stated that they would not present any witnesses at the hearing on Wainwright's motion for a preliminary injunction (238a). At no time before or during the hearing on the preliminary injunction motion did the Transcript give any indication that they wished to present any witnesses, not even after the Court stated at the hearing that it was inclined to grant an injunction. The Transcript chose to rely solely on Mr. Holman's conclusory affidavit.

As this Court held in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), sustaining a temporary injunction issued solely on the basis of affidavits:

"A party who chooses to gamble on that procedure [relying on affidavits] cannot be heard to complain of it when the decision is adverse." 429 F.2d at 1205 (footnote omitted)

In *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 428 F.2d 551, 554 (2d Cir. 1970), an action for copyright infringement, the Court of Appeals found "without substance . . . the defendants' claim that the preliminary injunction should not have been granted in the absence of an evidentiary hearing." The Court of Appeals stated:

"With the certificate of registration prima facie evidence of the facts contained therein, and the admitted copying by defendants of plaintiff's pin after actual notice of the copyright, and absent convincing support for defendants' claims upon which they seek to defeat plaintiff's copyright, it cannot be said that the district court abused its discretion in granting the requested relief." 428 F.2d at 553 (footnotes omitted)

The Transcript was given the opportunity to present witnesses and chose not to do so. They cannot now use

the lack of an evidentiary hearing on their own affirmative defense as a ground for reversal.

In short, the Transcript utterly failed to carry their burden as to the affirmative defense of unclean hands, and the Court so found.

The Transcript's reliance on Judge Lombard's concurring dictum in *Rosemont Enterprises, Inc. v. Random House, Inc.*, *supra*, 366 F.2d at 311 is misplaced. In *Rosemont* the defendants claimed that the plaintiff purchased the copyrights in question solely for the purpose of bringing the lawsuit and that for this reason plaintiff is deprived "of the right to relief as a matter of law and as a matter of equitable discretion" 366 F.2d at 305. That Judge Lombard's concurring opinion must be read in this context is clear from his own words:

"It would be contrary to the public interest to permit any man to buy up the copyright to anything written about himself and to use his copyright ownership to restrain others from publishing biographical material concerning him." 366 F.2d at 311.

• • •

"Such undisputed facts as were before the district court seem to me to point to the existence of a scheme developed by Hughes and his attorneys and employees to prevent the publication of a biography of Hughes and, in particular, the Random House biography." 366 F.2d at 311-312.

• • •

"Here Rosemont Enterprises acquired the Look copyright and sued upon it six days later asking injunctive relief, not with a desire to protect the value of the original writing but to suppress the Random House biography because Hughes wished to prevent its publication." *Id.* at 313.

The Transcript has not alleged, nor could they, that Wainwright purchased any of the copyrights at issue in this action, or that Wainwright is seeking to restrain them from publishing material concerning the companies which are the subjects of its Research Reports. It follows that the discussion concerning unclean hands set forth in Judge Lombard's opinion in *Rosemont* does not aid the Transcript.

The record does not, nor can it be made to, support the contention that Wainwright is attempting to use the copyright laws to restrict access to its Research Reports. Wainwright sells its Reports for cash to anyone who wishes to buy them (194a). In addition, Wainwright Reports selected by Find/SVP are offered for sale by Find/SVP (195a). Finally, Wainwright would not, nor could it, prevent references being made to its Reports within the bounds of fair use whether by newspapers or anyone else. The reason Wainwright commenced this action was to prevent the continued wholesale appropriation of its copyrighted Reports by the Transcript.

In *Bentley v. Tibbals*, 223 F. 247 (2d Cir. 1915), it was held that a defense of unclean hands is applicable only where the transgression of which plaintiff is accused has in some way harmed or prejudiced the defendant. In *Rosemont*, defendants were injured by plaintiff's purchasing the copyrights in articles on the life of Howard Hughes to prevent the publication of *any* biography of Mr. Hughes. The Transcript remains free to publish material concerning the companies which are the subjects of Wainwright's Reports, and to make reference to such Reports within the bounds of fair use.

The basis of the unclean hands defense which was rejected in the *Bentley* case was a violation of the Copyright Act, as was the basis of the unclean hands defense rejected in *Jacoby-Bender v. Jacques Kreisler Manufacturing Corp.*,

287 F.Supp. 134 (S.D.N.Y. 1968). The unclean hands defense asserted by the Transcript in the case at bar involves purported violation of the securities laws, and is therefore so remote from the issues in this case that it should be dismissed as a matter of law. *Cf. Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888, 899 (S.D.N.Y. 1948).

### CONCLUSION

For the foregoing reasons, the Preliminary Injunction issued by the District Court should be affirmed in all respects.

Dated: New York, New York  
March 17, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

- - - - - X  
WAINWRIGHT SECURITIES INC., :  
Plaintiff, :  
-against- :  
WALL STREET TRANSCRIPT CORPORATION : AFFIDAVIT  
and RICHARD A. HOLMAN, : OF SERVICE  
Defendants. :  
- - - - - X

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

PETER K. DEMMERLE, being duly sworn, deposes and  
says:

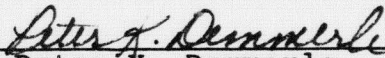
1. I am over the age of 18 years and not a party  
to this action.

2. On the 17th day of March, 1977, I served the  
annexed Brief for Plaintiff-Appellee upon:

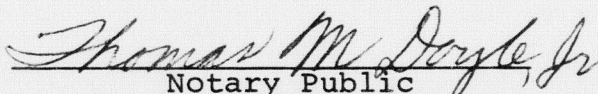
Eaton Van Winkle & Greenspoon  
600 Third Avenue  
New York, New York 10016

Richard A. Holman, Esq.  
120 Wall Street  
New York, New York 10005

by personally delivering and leaving two true and correct  
copies thereof at their respective offices.

  
Peter K. Demmerle

Sworn to before me this  
17th day of March, 1977

  
Notary Public

THOMAS M. DOYLE, JR.  
Notary Public, State of New York  
No. 394640006  
Qualified in New York County  
Commission Expires March 30, 1978